(Penang) following the provision of section 59 of the Crown Suits Ordinance then, in which the commission of various breaches of trusts was alleged against the trustees the suit should be commenced in the name of the Attorney-General as plaintiff. Section 59 of the Colony Ordinance then provided substantially the same as now provided by subsection (3) of the present section 9 of our Ordinance. Whitley J. said in the judgment of *Cheah Ewe Chong's* case: —

"It was argued that the effect of this section is to make it immaterial whether the Attorney-General is plaintiff or defendant so long as he is a party, but I do not think that the section goes so far as that. It does not purport to create a new practice; it merely provides that in suits regarding charities and public interests the practice and the position of the Attorney-General shall be substantially the same as in England and that where he would be a plaintiff in England he should be plaintiff here and where he would be a defendant in England he should be a defendant here.

It is, I think, clear on reference to the authorities that in England in a case such as the present in which breaches of trust are alleged against trustees the proceedings would be by an action in the nature of an information. The proper and formal shape of a suit for determining the mode in which the funds of a charity should be administered was by the information of the Attorney-General. Per Wigram V.C., *Governors of Christ's Hospital* v. *the Attorney-General,* (1846) 5 Hare 257. The Attorney-General appeared before the court not as an ordinary plaintiff endeavouring to obtain redress for a private wrong but rather as one officer of the Crown informing the judge, another officer of the Crown, of some neglect on the defendant's part in the performance of a public duty and demanding a remedy. Under the present practice the title 'information' is not used and an action would be commenced by writ of summons but the action would still be brought by the Attorney-General at the instance of relators, and his consent and authority would be required throughout the proceeding though he does not always act personally."

Whitley J. then described the alternative method in England under Romilly's Act and continued as follows: —

"It is important to note that under either method no proceedings could be instituted without the approval in one form or another of the Attorney-General, and the reasons for insisting upon this safeguard in such cases are clearly set out by Eldon L.C., in two of his judgments.

In the case of the *Attorney-General* v. *Green,* 1 Jacob & Walker 303, he observes:-

It is the duty of the court to take care that as little expense as possible should be incurred by the charity estate.

I apprehend the Legislature was very careful when it passed that Act (Romilly's) seeing that some abuses might arise from the proceeding by petition to provide that no one should proceed in that way without the approbation of the Attorney-General or the Solicitor-General. Here it was presented without that sanction. . . . It is clear that the order on the petition must be considered as a nullity."

In *Kader Mydin & Ors.* v. *Hadjee Abdul Kader*[4] was a suit to have it declared that certain lands were the subject matter of a charitable devise. Defendant took preliminary objection that the Attorney-General should have been a party to the suit. Wood J. said in his judgment (at page 490):

"I am of opinion that the objection is not premature and that the Attorney-General is properly required to be a party, this being a suit relating to charity funds. The case of *Mossil* v. *Lawson* is contrary to the general run of authorities, and being a very old case, cannot be looked on as an authority. I shall order the adjournment of the case, so that the plaintiff may insert the name of the Attorney-General as a party."

In *Cheah Ewe Chong's* case, *supra,* Whitley J. raised the same question:

"That being so, the question arises as to what is the best course to pursue having in mind always the best interests of charity. As Eldon L.C., pointed out in the case of *Attorney-General* v. *Green, supra,* it is the duty of the court to take care that as little expense as possible should be incurred by the charity estate, and the court has in many instances relaxed in favour of charities the rigour of its rules of procedure.

Examples are given in Tudor on Charities, 5th edn., 351. An action may by amendment of the writ and statement of claim be turned into an information and action, the necessary sanction of the Attorney-General being obtained. *Caldwell* v. *Pagham Harbour Reclamation Company,* (1876) 2 Ch.D. 221.

This case was followed by Wood J., in the Penang case of *Hajee Abdullah* v. *Khoo Tean Tek,* 1 Kyshe 500, where the plaintiffs having obtained leave to use the name of the Attorney-General moved *ex parte* for an order to amend the pleadings by inserting the name of the Attorney-General as plaintiff and adapting the pleadings to the new state of facts. The amendment was allowed on payment of the costs occasioned thereby. Two alternatives thus appear to be open to me. I should not in any case dismiss the suit as that might hereafter raise a question of *res judicata.* I can either set aside all proceedings or make an order similar to that made in Suit No. 724 of 1930, already referred to, giving the plaintiffs the opportunity of obtaining the leave of the Attorney-General. The latter course would seem to me the better in the interests of all parties as it will save the expense of instituting proceedings anew."

In the context of section 9 of our Ordinance it is my view that the provision of subsection (2) does not by itself justify that the whole proceeding should be set aside at this stage. In the instant case I therefore propose to make an order that the plaintiff do within two weeks hereof comply with the provision of subsection (1) of section 9 of the Government Proceeding Ordinance, 1956 in default thereof all proceedings shall be set aside with costs to be taxed to be paid by the plaintiff to the first, second and third defendants. Costs of the present application and incidental thereto to the first three defendants in any event. My order made on February 10, 1975 in chambers varied accordingly.

Order accordingly.

Solicitors: *Lim Kean Chye & Co.; Yeoh Kean Teck & Co.; H.L. Sharma.*

S. A. ANDAVAN v. REGISTRAR OF TITLES, NEGERI SEMBILAN & ORS.

[O.C.J. (Ajaib Singh J.) September 23, 1975]

[Seremban — Originating Summons No. 61 of 1974]

Practice & Procedure — Judgment in default — Judgment obtained irregularly — Non-compliance with the rules — Whether court may set aside — R.S.C. 1957, O.4 r.2(3) to (5), O.13 rr.3, 12, O.27 r.11, O.40 r.1 — National Land Code, ss. 323(1), 335, 338 & 417.

Practice and Procedure — Litigation — Rules of procedure.

A loan of $18,000 was given by the applicant to the second respondent on November 23, 1966 on security of land which was charged to the applicant. Upon realising that Lot 1682 was not included in the charge the applicant caused a private caveat to be entered against Lot 1682 on January 11, 1967. The applicant foreclosed the charge in respect of Lot 2149 and realised a sum of $11,057.55. On August 30, 1967 the applicant filed Civil Suit 133 of 1967 against the second respondent for the balance of $6,942.45 and on September 4, 1967 the applicant obtained an order that his private caveat entered against Lot 1682 be extended until the conclusion of the action in Civil Suit 133 of 1967. Meanwhile on May 26, 1967 the second respondent executed a transfer of Lot 1682

in favour of his younger brother the third respondent. Thereafter the third respondent made three attempts to have the transfer registered but failed to do so because of the applicant's caveat on the land. Civil Suit 133 of 1967 came up for hearing on May 14, 1971 and in the absence of the second respondent, the applicant obtained judgment in the sum of $6,942.45 and costs. The applicant then proceeded to take execution proceedings and obtained an order for sale of Lot 1682 dated April 17, 1972 and pursuant to this order the sale of Lot 1682 took place at a public auction on June 15, 1972 when the land was sold to one Liew Hee for $7,800. On July 12, 1972 the third respondent intervened in the execution proceedings and applied to have the sale set aside on the ground that he was the beneficial owner of the land. This application was heard on July 4, 1973 and the decision thereon was reserved.

On July 9, 1973 and before any decision was made on his application to set aside the sale the third respondent filed Civil Suit 84 of 1973 claiming as against the second respondent an order under section 417 of the National Land Code directing the Registrar of Titles to register the transfer of Lot 1682 in the third respondent's name and for a declaration that the third respondent was the beneficial owner of Lot 1682. As against the applicant he sought a declaration that the caveat entered against Lot 1682 was invalid, null and void and that the Registrar of Titles be directed to cancel the caveat. The writ was served on the second respondent but not on the applicant. The second respondent did not enter appearance whereupon the third respondent obtained judgment by default against the second respondent. The applicant's name was entered in the formal parts of the default judgment as the second defendant. By virtue of this judgment the third respondent got the transfer of the land registered in his name four days later on July 24, 1973.

On September 10, 1975, Wan Suleiman F.J. gave his decision in the intervener proceedings (see [1976] 1 M.L.J. 147). The applicant had, in that proceedings, submitted that an examination of the register of title deeds would show that he had lodged the caveat on the basis that he was a victim of misrepresentation or fraud. His Lordship held that the applicant did not come under any of the categories of persons at whose instance a private caveat may be entered under section 323(1) of the National Land Code, 1965. The learned judge set aside the order of sale on the grounds that there had been material irregularities in obtaining the order of sale and in the conduct of the sale.

The applicant had applied for a declaration that the said transfer of Lot 1682 by the second respondent to the third respondent in the Registry of Titles was null and void. He also sought for an order that the said land be transferred by the third respondent to the second respondent.

Held: (1) the court may discharge an irregular order without application being made for this purpose;

(2) the default judgment dated July 20, 1973 was bad and irregular because in obtaining this judgment the third respondent did not comply with order 13 rule 12, order 27 rule 11 and order 40 rule 1 of the Rules of the Supreme Court, 1957.

Semble: Litigation is governed by rules of procedure and no side may take undue advantage over another by side-stepping any rule and it is the duty of the court to ensure that the parties engage themselves in a fair contest.

Parties in civil suits should observe the rules of procedure with meticulous care because a failure to do so may well result in irreparable set-backs for them and it is not often that a court will take it upon itself to free the parties from difficulties of their own making and put them on their feet again.

[Editorial Note: The second respondent in this case had appealed against the decision (vide Federal Court Civil Appeal No. 141 of 1975) but the appeal was later withdrawn and was struck out at the sitting of the Federal Court on January 12, 1976].

Case referred to:-

(1) *Boyce* v. *Gill* (1891), 64 L.T. 825.

ORIGINATING SUMMONS.

S.K. Lingam for the applicant.

James Ponniah for the 2nd and 3rd respondents.

Naranjan Singh for Liew Hee (purchaser).

Ajaib Singh J.: The applicant is a moneylender and has applied through his attorney for a declaration that the transfer of land comprised in C.T. 14493 Lot 1682 in the Mukim of Pantai executed by the second respondent and registered in the Registry of Titles in favour of the third respondent on July 24, 1973 is null and void. He also seeks a further order that the said land be transferred by the third respondent back to the second respondent and that the Registrar of Titles do rectify the Register accordingly. The application by originating summons was filed in the High Court on August 13, 1974 and it was served on the first respondent on August 20, 1974 and on the third respondent on November 15, 1974. Several attempts to have the summons served on the second respondent failed and service on him had to be effected by way of substituted service on January 6, 1975. In his affidavit in support of his application for substituted service the applicant stated that the process-server of the court made four unsuccessful attempts to effect service of the originating summons on the second respondent and that a registered letter sent to the second respondent suggesting two convenient dates to meet the process-server and enclosing a copy of the originating summons was returned with a notification by the postal authorities that the letter had been refused by the second respondent. The learned Legal Adviser, Negri Sembilan, entered an appearance for the first respondent on March 14, 1975 and the third respondent entered appearance through his solicitors on December 2, 1974. The second respondent did not enter any appearance. On March 24, 1975 the applicant issued a notice of appointment to hear the originating summons and had it served on the learned Legal Adviser on April 3, 1975 and on the third respondent on April 21, 1975. The process-server's endorsements on this notice show that he made six attempts to serve the notice on the second respondent but without success. On the first occasion he was informed that the second respondent was no longer living at the address shown in the notice and on the subsequent five occasions that he went to the second respondent's new address he was informed that the second respondent was out. The originating summons came up for hearing before me on May 19, 1975 when I noticed that both the second and third respondents had filed their affidavits in reply to the applicant's affidavit. The second respondent had filed his affidavit notwithstanding that he had not entered any appearance and had not even been served with the notice of appointment to hear the originating summons. Mr. Soo Lim Pang who appeared for the second and third respondents undertook to accept service on behalf of the second respondent but till today no appearance has been entered by or on behalf of the second respondent. I have set out these preliminary matters in some detail because I think this will have some bearing on the case as a whole and its final outcome.

The attorney's affidavit in support sets out the facts leading to the present application. He states

that on or about November 23, 1966 the second respondent obtained a loan of $18,000 from him and as security thereof the second respondent fraudulently charged an old rubber estate which was not worth the sum lent whereas the second respondent had actually shown him a different estate planted with high-yielding rubber trees which was held out to him as the subject-matter of the security. He says that on discovering the true position he entered a private caveat on the land actually shown to him by the second respondent namely Lot 1682 on the basis of a person claiming to have been misrepresented or defrauded in equity. Subsequently he foreclosed the charge on the old rubber estate and realised $11,057.55 leaving a balance of $6,942.45 for the recovery of which he filed Civil Suit 133 of 1967 in the High Court. The second respondent entered appearance in this civil suit and in due course filed his defence and counterclaim. Thereafter he caused a notice of intended removal of the caveat to be served on the applicant by the Registrar of Titles. The applicant then applied to the court for an order that the caveat be extended until the conclusion of the suit which was granted to him by this court on September 4, 1967 and registered in the Land Registry, Seremban.

The applicant further contends that the second respondent fraudulently executed a transfer of Lot 1682 to the third respondent but when it was sent for registration the transfer was rejected by the Registrar of Titles because of the caveat. Two further attempts to have the transfer registered also failed. On May 14, 1971 the applicant's action in Civil Suit 133 of 1967 for the balance sum of money came up for hearing when the second respondent was absent and judgment was entered against him. After obtaining judgment the applicant took execution proceedings and the land comprised in Lot 1682 was sold at a public auction to one Liew Hee on June 15, 1972 pursuant to an order for sale made by the High Court on April 17, 1972. However on July 12, 1972 the third respondent took out intervening proceedings in Civil Suit 133 of 1967 to have this sale set aside on the ground that he was the beneficial owner of Lot 1682 as the land had been sold to him by the second respondent some time in May 1967 and the transfer of the land was duly executed by the second respondent to him on May 26, 1967. These intervening proceedings were heard by Tan Sri Wan Suleiman F.J. on July 4, 1973 when his Lordship reserved judgment.

Five days later on July 9, 1973 and before any decision had been made by the court in the intervening proceedings the third respondent filed an action in Civil Suit 84 of 1973 in the High Court against the second respondent and the applicant as defendants. As against the second respondent he asked for an order under section 417 of the National Land Code directing the Registrar of Titles to register the transfer of Lot 1682 in his name and secondly for a declaration that he was the beneficial owner of Lot 1682. As against the applicant the third respondent asked for a declaration that the caveat entered by the applicant was invalid null and void and that it be removed from the register. This suit was not served on the applicant but it was served on the second respondent on July 10, 1973. The second respondent did not enter appearance and a default judgment was obtained against him on July 20, 1973. The applicant's attorney states that the transfer executed by the second respondent in favour of the third respondent and registered on July 24, 1973 was done fraudulently and in collusion by the second and third respondents.

The contents of the affidavits filed by the second and third respondents in reply are substantially similar. The allegation of misrepresentation or fraud is denied and they say that the applicant was aware of the actual land charged against the loan which was Lot 2149 and not Lot 1682. This land had been charged thrice previously to the applicant and it was not possible for the applicant's attorney to mistake the one piece of land for the other. The second respondent admits that judgment was given against him in favour of the applicant for a sum of $6,942.45 which was the balance sum on the loan and he says that the private caveat lodged by the applicant against Lot 1682 lapsed on the date of the said judgment dated May 14, 1971 as there was no further order extending the caveat. He says that the registration on July 24, 1973 of the transfer of the land in Lot 1682 executed by him in favour of the third respondent was as a result of a proper and lawful sale on May 26, 1967. It was also contended that the applicant's caveat was null and void and of no effect as the applicant had no caveatable interest in the disputed land. The second respondent further says that at the time of the sale of the land by him to the third respondent he was not aware of the applicant's caveat. The sale of the disputed land was *bona fide* and for valuable consideration. With regard to the applicant's statement that he had taken out execution proceedings the second and third respondents say that the execution order was not registered on the title deed of the disputed land and as such no execution was effected under Order 43 rule 2(3) of the Rules of the Supreme Court or section 335 of the National Land Code and therefore the land was not under seizure by the Sheriff. Moreover the public auction took place more than six months after the date of the execution order and was therefore a nullity as the order was not renewed after six months as required by Order 43 rule 2(4) and (5) of the Rules of the Supreme Court and section 338 of the National Land Code.

When the application came up for continued hearing before me on July 2, 1975 one Liew Hee appeared in court and applied that he be made a party in the proceedings on the ground that he was an interested party. In his affidavit filed in these proceedings Liew Hee said that he had purchased Lot 1682 at a public auction on June 15, 1972 which was held pursuant to the order of sale made by this court on April 17, 1972 and had deposited the purchase price of $7,800 in the High Court after the sale. He states further that he made a search in the High Court Registry on June 10, 1974 and discovered that the third respondent had as plaintiff in Civil Suit 84 of 1973 named the second respondent and the applicant as defendants. The third respondent served the writ only on the second respondent who failed to enter an appearance and as such judgment by default was entered against the second respondent on July 20, 1974 and pursuant to this judgment the land was

registered in the name of the third respondent on July 24, 1973.

Liew Hee further alleges in his affidavit that the third respondent failed on two occasions to get the land registered in his name and in order to circumvent the matter he filed Civil Suit 84 of 1973 through his solicitors who were acting for the second and third respondents in the present originating summons as well as in Civil Suit 133 of 1967 wherein the second respondent was the defendant and the third respondent was the intervener. Liew Hee further states that the third respondent is the younger brother of the second respondent and he alleges that acting in collusion with the second respondent the third respondent had fraudulently got the land in Lot 1682 transferred to his name in order to defraud the plaintiff in Civil Suit 133 of 1967 and also to defraud him who had bought the land in good faith at a public auction held on June 15, 1972 pursuant to the order of court dated April 17, 1972. Liew Hee in his affidavit supported the application in the originating summons on the ground that the transfer of the land effected by the order of court dated July 20, 1973 obtained in default of appearance of the second respondent was invalid as it was obtained in collusion between the second and third respondents. He alleged that the order of sale of April 17, 1972 had not been set aside and the sale of the land pursuant to that order held at a public auction on June 15, 1972 was still valid and therefore the registration of the transfer of the land to the third respondent was null and void.

Mr. James Ponniah for the third respondent objected to the said Liew Hee being made a party to the proceedings but I overruled this objection as I thought that it was in the interest of justice that Liew Hee be made a party in the proceedings for the complete determination of the matter before me.

On September 10, 1975 Tan Sri Wan Suleiman F.J. gave his decision in the intervener proceedings.* In those proceedings the intervener had prayed for an order that the order of attachment and the sale of Lot 1682 held at the public auction on June 15, 1972 pursuant to the order of court dated April 17, 1972 be set aside. His Lordship agreed with counsel for the intervener who is the third respondent in the present application before me that the applicant did not come under any of the categories of persons at whose instance a private caveat may be entered under section 323(1) of the National Land Code. His Lordship observed that in the affidavit of the applicant filed in opposition to the intervener proceedings the applicant asserted that an examination of the register of title deeds would show the reason why he had lodged the caveat which was that he was a person claiming to be the victim of misrepresentation or to have been defrauded in equity. Tan Sri Wan Suleiman F.J. also held that there had been material irregularities in obtaining the order of sale and in the conduct of the sale and on those grounds too his Lordship would set aside the order of sale.

In the present application before me the applicant's attorney had similarly stated in his affidavit in support that he had entered a private caveat against Lot 1682 on the basis of a person claiming to have been misrepresented or defrauded in equity. If the matter had rested here I would have had no hesitation in adopting the decision of Tan Sri Wan Suleiman F.J. However I find that there is other evidence before me which ought to be considered in arriving at a decision whether or not the applicant had a caveatable interest in the land concerned. The statutory declaration of the applicant dated January 11, 1967 which was exhibited in the proceedings before me sets out elaborately the manner in which the applicant had advanced the sum of $18,000 as a loan to the second respondent. I think it will help if the declaration is set out in full which is as follows: —

"1. That I am the Attorney of S.A. Andavan presently in India and formerly of No. 6 Cameron Street, Seremban, and the Power of Attorney therefor is duly registered in the Registry of the High Court at Seremban under No. 31 of 1964.

2. That my principal is a registered Moneylender under Licence No. 38/66-67.

3. That on or about November 23, 1966 one Siow Meow Choy of No. 293 Temiang Road, Seremban, proposed to borrow a sum of $18,000 to be secured by a Charge to be signed and registered in respect of land held under Certificate of Title No. 7201 for Lot No. 2149 in the Mukim of Ampangan, in the District of Seremban, in area 16 acres O r 20 poles (hereinafter referred to as 'the said land') which he held out to me to be fully replanted with high yielding cloves and had been just opened up for tapping.

4. That this land was charged to my principal under three charges in the sum of $6,200; $2,300 and $6,500 respectively, whereupon a sum of $5,000 had been paid by him and there was a balance of $10,000 still due and owing to my principal.

5. The said proposal was to discharge all the three charges, set off the above-mentioned sum of $10,000 which was due and owing as aforesaid and I was to pay the sum of $8,000 after the execution of the Memorandum under the provisions of section 16 of the Moneylenders Ordinance No. 42 of 1951 and signing proper discharges therefor and obtaining a fresh Memorandum of Charge to be signed contemporaneously.

6. I on behalf of my principal aforesaid accepted the said proposal on condition that the said Siow Meow Choy took me to the land and satisfied me that it was really replanted as aforesaid.

7. On the same date *i.e.* November 23 1966 I accompanied him and he took me to an estate which was replanted as alleged by him and which he held out to be under the said issue document of title.

8. On seeing the estate, I on behalf of my principal aforesaid agreed and accepted the said proposal and completed the transactions in Mr. Yong Sze Lin's Office who prepared the said Memorandum, an on demand charge for $18,000, the said discharges and the new charge which was duly stamped and forwarded for registration.

9. Later I learnt that the said Siow Meow Choy had given an option to sell the said land, purporting to be newly replanted as he had held out to me and that an interested purchaser had made a search and had discovered that the said land was having very old and badly tapped rubber trees thereon.

10. Upon learning the foregoing, I made a search in the Land Office and discovered that the land shown to me consisted of several lots out of which only one lot was registered in the name of the said Siow Meow Choy under Certificate of Title No. 14493 for Lot No. 1682, in the Mukim of Pantai in the District of Seremban in area 5.137 acres only and the others having the same type of trees were registered in the names of other members of his family instead of the agreed 16 acres O r 20 poles as alleged by him. If I had known this then I would have certainly insisted on a charge on this land as well and therefore I have a registerable interest or right to such title or interest in this land.

11. That I was induced to act on the fraudulent misrepresentations of the said Siow Meow Choy and now (discover that the said land charged to me has been allotted the charge presentation and other relevant numbers by the Registrar of

Titles, but has not as yet been signed by the Registrar and a copy thereof returned to me) may not be sufficient to cover my security.

12. That upon receipt of the copy of the said charge when registered, I am going to proceed to take the Remedies of a Chargee and make an application to Court for Order for Sale in compliance with the provisions of the National Land Code.

13. As the said land charged to me may not be sufficient to cover my security and I am in genuine fear that during the one month's tenure of my notice to the said Siow Meow Choy, the Chargee, under Form 16 E of the National Land Code, as required by section 255 of the said Code, the said Siow Meow Choy may sell the land held under Certificate of Title No. 14493 for Lot No. 1682, in the Mukim of Pantai in the District of Seremban, and put it out of my reach and defeat my rights to recover the shortage of the security of $18,000 aforesaid, if any.

14. Therefore I humbly pray that in the meantime, in order to protect my interests and to avoid same being defeated by the said Siow Meow Choy as feared by me, that the land held under Certificate of Title No. 14493 for Lot No. 1682 aforesaid be protected by means of a Private Caveat until my claim is settled in full AND I make this declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1960."

Later in August 1967 when the applicant applied for an order that his caveat be extended until the conclusion of his action in Civil Suit 133 of 1967 he substantially repeats in his affidavit in support the statements he had made in his earlier statutory declaration. Thus the applicant had *prima facie* shown that he had good grounds to lodge a private caveat in his capacity as a moneylender on land charged to him as security on a loan. In support of this proposition I would refer to the Torrens System in Malaya by S.K. Das at pages 350-351 wherein the learned author states that a moneylender who has lent money upon an oral promise to charge land as security for the loan has been held entitled to lodge a caveat on the land. Three cases are cited therein. I hold therefore that the applicant in the present case had a caveatable interest on Lot 1682.

I think it right to point out that this statutory declaration in respect of the application for the entry of the applicant's caveat was not before Tan Sri Wan Suleiman F.J. when he heard the intervener proceedings. In his affidavit in opposition to the intervener proceedings the applicant did not mention all those matters which he had set out in his declaration and all that he said in his affidavit was that he was a person claiming to be the victim of misrepresentation or to have been defrauded in equity which certainly was not sufficient to bring him within the category of persons who are entitled to lodge private caveats under the National Land Code.

So much for the submission relating to the right of the applicant to enter a private caveat against Lot 1682. The caveat was entered on January 11, 1967 and it was subsequently extended by order of court until the conclusion of Civil Suit 133 of 1967. This suit was concluded on May 14, 1971 when judgment was entered against the second respondent for the balance sum of money owing to the applicant so that after May 14, 1971 the applicant's caveat on Lot 1682 ceased to have any effect whatsoever. Thereafter it was left to the applicant to enforce his judgment against the property of the second respondent by instituting appropriate execution proceedings which in fact were commenced but proved futile for having been set aside by Tan Sri Wan Suleiman F.J. because of non-compliance with the rules relating to execution proceedings.

Now to deal with the originating summons itself. After giving due consideration to the evidence before me and the submissions advanced on behalf of the parties I have come to the conclusion that in obtaining the default judgment of July 20, 1973 and consequently in getting the transfer of Lot 1682 registered in the name of the third respondent on July 24, 1973 the second and third respondents were guilty of fraud and collusion and of unconscionable conduct in their attempt to deprive the applicant and the purchaser of Lot 1682 of their just dues. To recapitulate the main events: The loan was given by the applicant to the second respondent on November 23, 1966 on security of land which was charged to the applicant. Upon realising that Lot 1682 was not included in the charge the applicant caused a private caveat to be entered against Lot 1682 on January 11, 1967. The applicant foreclosed the charge in respect of Lot 2149 and realised a sum of $11,057.55. On August 30, 1967 the applicant filed Civil Suit 133 of 1967 against the second respondent for the balance sum of $6,942.45 and on September 4, 1967 the applicant obtained an order that his private caveat entered against Lot 1682 be extended until the conclusion of the action in Civil Suit 133 of 1967. Meanwhile on May 26, 1967 the second respondent executed a transfer of Lot 1682 in favour of his younger brother the third respondent. Thereafter the third respondent made three attempts to have the transfer registered but failed to do so because of the applicant's caveat on the land. Civil Suit 133 of 1967 came up for hearing on May 14, 1971 when the second respondent was absent and upon proving his claim the applicant obtained judgment in the sum of $6,942.45 and costs. The applicant then proceeded to take execution proceedings and obtained an order for sale of Lot 1682 dated April 17, 1972 and pursuant to this order the sale of Lot 1682 took place at a public auction on June 15, 1972 when the land was sold to Liew Hee for $7,800. On July 12, 1972 the third respondent intervened in the execution proceedings and applied to have the sale set aside on the ground that he was the beneficial owner of the land. This application was heard on July 4, 1973 and the decision thereon was reserved. On July 9, 1973 and before any decision was made on his application to set aside the sale the third respondent filed Civil Suit 84 of 1973 claiming as against the second respondent an order under section 417 of the National Land Code directing the Registrar of Titles to register the transfer of Lot 1682 in the third respondent's name and secondly for a declaration that the third respondent was the beneficial owner of Lot 1682. As against the applicant he sought a declaration that the caveat entered against Lot 1682 was invalid null and void and that the Registrar of Titles be directed to cancel the caveat. The proceedings in this suit disclose that no attempt was made to serve the writ on the applicant but it was served promptly on the second respondent on the very next day that it was filed in court. There could have been no difficulty in serving the writ on the second respondent as it was

served by the clerk of the solicitors who were acting for the second and third respondents. The second respondent did not enter appearance whereupon the third respondent obtained judgment by default against the second respondent on July 20, 1973 ordering the Registrar of Titles under section 417 of the National Land Code to register the transfer of the land in Lot 1682 in the name of the third respondent and a further declaration that the third respondent was the beneficial owner of Lot 1682. The applicant's name is entered in the formal parts of the default judgment as the second defendant. By virtue of this judgment the third respondent got the transfer of the land registered in his name four days later on July 24, 1973. It must be pointed out here that the default judgment dated July 20, 1973 was bad and irregular because in obtaining this judgment the third respondent had failed to comply with Order 13, rule 12, Order 27 rule 11 and Order 40 rule 1 of the Rules of the Supreme Court. Under these rules it was incumbent upon the third respondent to enter judgment in Civil Suit 84 of 1973 by motion. Instead, he procured the default judgment as if it fell within Order 13 rule 3 which provides for a plaintiff not being a moneylender to enter judgment for a simple liquidated claim against a defendant who fails to enter an appearance.

The third respondent had certainly found a sure way of getting speedy justice. Why should he want to wait for a decision on his application to set aside the sale when he thought he could achieve his purpose by disregarding the rules of procedure? But then as a layman he can have little knowledge about obtaining judgments by default and it was for his solicitors really to ensure that the rules of procedure were strictly followed in obtaining that judgment. I have no reason to say that the solicitors concerned deliberately disregarded the rules but I do feel that they could have exercised a little more care in this matter especially when the judgment was going to adversely affect a third party namely the applicant who was made a defendant in the civil suit but who knew nothing of what was going on behind his back. It would not have been that easy for the third respondent to obtain judgment by default if he had adhered strictly to the relevant rules of procedure because upon setting down the action on motion for judgment the court would most certainly have inquired into the position of the applicant before giving any judgment by default.

As I have mentioned at the outset of this judgment the applicant claimed a declaration that the transfer of the land in Lot 1682 executed by the second respondent in favour of the third respondent on May 26, 1967 and registered on July 24, 1973 was null and void and a further order that the land be transferred back to the second respondent. Making an order in absolute terms of these prayers would mean that I am adjudicating upon the validity of the transfer itself. This I am not prepared to do. The conduct of the second and third respondents as a whole does cast a doubt on their *bona fides* in the execution of the transfer but I think that the evidence by affidavit alone both for and against the validity of the transfer is insufficient and inconclusive and it may be necessary to hear the parties themselves in court before a considered decision can be arrived at as to its validity. So I have been thinking what exactly to decide in this originating summons that is now before me. The applicant's grievances are not without substance and the second and third respondents should not be allowed to steal a march on him. Within a mere fortnight or so of the filing of Civil Suit 84 of 1973 the second and third respondents managed to defeat the claims of the applicant and the purchaser Liew Hee in respect of Lot 1682 by a clever manoeuvre — the second respondent would not enter appearance in the civil suit and the third respondent would obtain judgment by default which would declare him as the beneficial owner of the land and direct the Registrar of Titles to register the transfer of Lot 1682 to his name. Litigation is governed by rules of procedure and no side may take undue advantage over another by side-stepping any rule and it is the duty of the court to ensure that the parties engage themselves in a fair contest. I am therefore of the view that in all the circumstances of this case justice may well be served if the parties are put into the position in which they were immediately before the default judgment was obtained on July 20, 1973 except that the order of court dated September 10, 1975 setting aside the sale of Lot 1682 must stand and take effect. The parties can be restored to their former position only if the default judgment is set aside but no application to set aside that judgment has been made by the interested parties who could have done so namely the applicant in the originating summons and the purchaser Liew Hee and the question now arises whether I should on my own motion set aside the default judgment.

Generally speaking it is for an interested party who is affected by a default judgment to apply to have it set aside but if during the hearing of any cause or matter it comes to the notice of the court that there has been a serious procedural irregularity in the obtaining of a judgment which in some way adversely affects the rights of any of the parties before it the court may set it aside on its own motion. The proposition that the court may discharge an irregular order without application being made for this purpose is not without authority for it was so held by Kekewich J. in the case of *Boyce* v. *Gill.*[1] In the present case before me I find that the third respondent obtained the default judgment irregularly to such an extent as to render it a nullity and I hereby set it aside on my own motion. Consequently I order that the registration of the transfer of Lot 1682 in the Registry of Titles on July 24, 1973 which was effected pursuant to the default judgment dated July 20, 1973 be cancelled and I further order that the Registrar of Titles do restore the name of the second respondent in the register as the owner of Lot 1682. It will be left to the parties now to pursue their respective rights in the matter as they may be advised and I should like to think that in doing so they will not let themselves fall into disarray again by failing to comply with the rules of procedure. The third respondent was not alone in not observing the rules. The second respondent filed his affidavit in reply in the originating sum-

mons but has so far failed to enter an appearance despite the undertaking given by his counsel that this would be done in due course. The applicant also had failed to follow the procedure relating to execution proceedings with the result that the sale of Lot 1682 to Liew Hee was set aside by the court. Parties in civil suits should observe the rules of procedure with meticulous care because a failure to do so may well result in irreparable set-backs for them and it is not often that a court will take it upon itself to free the parties from difficulties of their own making and put them on their feet again.

Costs of the proceedings are to be paid by the second and third respondents to the applicant and Liew Hee.

Order accordingly.

Solicitors: *Atma Singh Gill & Gill; Stanley Ponniah, Ng & Soo; Singh Bros.*

LUI AH YONG v. SUPERINTENDENT OF PRISONS, PENANG

[A.C.J. (Arulanandom J.) December 1, 1975]
[Penang — Originating Motion No. 22 of 1975]

Habeas Corpus — Application for — Illegal immigrant detained for 9 years, pending completion of arrangements for his removal — Citizenship of applicant in questional state — Whether detention could become illegal — Purpose of s. 324(1) of Immigration Ordinance considered — Immigration Ordinance 1959, s. 6(1), 34(1), 52(2) & 56.

Immigration — Illegal immigrant detained for 9 years — Whether detention could become illegal — Purpose behind s. 4(1) of Ordinance — Immigration Ordinance 1959, ss. 4(1), 6(1), 52(2) & 56.

About May 22, 1967, the applicant was arrested and detained by the police for illegal entry into the Federation from China. On August 24, 1967, he was charged in court for an offence under section 6(1) of the Immigration Ordinance 12/59 for entering the country illegally and for using a forged blue identity card. He pleaded guilty to both charges and was sentenced to two month's imprisonment for the first charge and three month's imprisonment for the second charge.

On November 25, 1967, the Controller of Immigration issued an Order of Removal under section 56(2) of the Immigration Ordinance. Section 56(2) reads, *inter alia*, as follows, "Any person unlawfully entering... the Federation... shall... be liable to be removed from the Federation by order of the Controller." An Order of Detention was also issued under section 34(1) of the Immigration Ordinance which reads as follows, "Where any person is ordered to be removed from the Federation under the provisions of this Ordinance, it shall be lawful for the Controller to order such person to be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal...."

Since then the applicant had been in custody for almost 9 years. Counsel for the appellant submitted that section 34(1) of the Immigration Ordinance was not intended for the purpose of detaining a person indefinitely and the inordinate length of detention made the detention illegal. The question raised was whether a detention which at its inception was legal could become illegal as a result of passage of time or for other reasons.

Held, allowing the application: (1) the powers of detention under section 34(1) are clearly and unambiguously limited to detention for the purposes of removal to one of two places, i.e. the place of embarkation or country of citizenship and therefore the moment the detaining authorities have failed or found themselves in a position where the object of detention cannot be fulfilled, the further detention becomes unlawful;

(2) the intention of the legislature in enacting section 34(1) of the Immigration Ordinance was certainly not to justify detention for life or for an interminable period. It is a rule of construction of statutes which have penal effects that they should be construed strictly and in favour of the liberty of the subject.

[**Editorial Note:** See now *Andrew s/o Thamboosamy* v. *Sup. of Pudu Prisons* [1976] 2 M.L.J. 156 F.C.].

Cases referred to:-

(1) *Ex parte Johannes Choeldi & Ors.* [1960] M.L.J. 184.
(2) *Chye Chong & Ors.* v. *Public Prosecutor* [1975] 1 M.L.J. 215.
(3) *Musa bin Salleh* v. *Public Prosecutor* [1973] 1 M.L.J. 167.

ORIGINATING MOTION.

Darshan Singh for the applicant.

Haji Abdullah bin Ngah (Senior Federal Counsel) for the respondent.

Arulanandom J.: "Something is rotten in the State of Denmark." These words were uttered by Marcellus in Shakespeare's Hamlet after the ghost of Hamlet's father appears to Hamlet and beckons Hamlet to follow it, and Hamlet follows. Marcellus uses these words not so much in condemnation but more in frustration and bewilderment.

In the case before me the applicant Lui Ah Yong seeks a writ of *Habeas Corpus* for his immediate release from the Penang Prison. The undisputed facts before this court are as follows:

About May 22, 1967 the applicant was arrested and detained by the police for illegal entry into the Federation from China. On the 24th of August 1967 he was charged in the Magistrate's Court Sitiawan for an offence under section 6(1) of the Immigration Ordinance 12/59 — namely for entering the country illegally. He pleaded guilty to the charge and was sentenced to two months' imprisonment. On the same day he was also charged with using a forged blue identity card. He pleaded guilty to the charge also and was sentenced to three months' imprisonment.

On the 25th of November 1967 the Controller of Immigration issued an Order of Removal under section 56(2) of the Immigration Ordinance.

Section 56(2) of the Immigration Ordinance reads as follows:

"Any person unlawfully entering or re-entering or attempting unlawfully to enter or re-enter the Federation or unlawfully remaining in the Federation shall whether or not any proceedings are taken against him in respect of such offences be liable to be removed from the Federation by order of the Controller."

On the same day the Controller also issued an Order of Detention under the powers vested in him under section 34(1) of the Immigration Ordinance which reads as follows:

"34. (1) Where any person is ordered to be removed from the Federation under the provisions of this Ordinance, it shall be lawful for the Controller to order such person to be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal:

Provided that any person detained under this subsection who appeals under the provisions of subsection (2) of section 33 against the order of removal may, in the discretion of the Controller, be released, pending the determination of his